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Contracts--Conditions Precedent--Promise to Pay When Able

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the policy in the instant case is plain, unambiguous, fair and reasonable, and, since no fraud or mistake is alleged or proven, the Court of Appeals of Kentucky arrived at the proper result when it decided that there was no waiver of the vacancy clause by the insurer.

SAMUEL C. KENNEDY.

CONTRACTS—CONDITIONS PRECEDENT—PROMISE TO PAY
WHEN ABLE

Action by an architect to recover the balance claimed to be due for services rendered in drawing up plans and specifications for a building to be built for the defendants. Under the terms of the contract the plaintiff was to receive his final compensation, which was to be a percentage based on the lowest bid, when the building was completed and approved by him. It was further provided that, if the church was unable to complete the building, he should receive his pay based on the lowest *bona fide* bid. The lowest bid was so much beyond what the church had expected to pay that they were forced to defer construction. The plaintiff sent in his bill for his services in full. The defendants claimed, *bona fide*, that they did not owe him the amount claimed. A compromise was reached whereby the defendants promised to pay the plaintiff the full amount claimed, and the plaintiff agreed to wait for final payment until such time as the defendant was financially able and deemed it advisable to complete the building. The plaintiff waited four years and then brought this suit to recover the amount still owing. *Held*: That when payment was to be made on the happening of an occurrence (becoming able to complete the building), it is implied that payment shall be made within a reasonable time, and that in the instant case, more than a reasonable time had elapsed, therefore payment was due. *Mock v. Trustees of First Baptist Church of Newport*.¹

The plaintiff in this case presented a just claim and should have been allowed to recover. However, the court would seem in error in its reasoning. There is no call for the court to imply in the compromise agreement a provision that payment was to be made within a reasonable time other than to reach the result desired, which result could have been reached by a line of reasoning more in accord with the generally accepted theories of contract law.

The decision in the instant case is based on Section 2100 of Page: *The Law of Contracts*, which reads as follows: "The time of performance is sometimes made to depend on the doing of some specified act other than that which the parties to the contract agree to do or is made to depend on the happening of some event which the parties to the contract do not covenant to cause to happen. The tendency of the courts is to hold that unless the contract clearly shows that such an action is an express condition, the provision with refer-

¹ 252 Ky. 243, 67 S. W. (2d) 9 (1934).

ence to such an act is inserted in order to fix the time of performance, but not to make the doing of such an act or the happening of such an event a condition precedent. If this is the intention of the parties, . . . the act which the parties agree to do upon the performance of such an act or upon the happening of such an event, is to be performed in at least a reasonable time." It is well to note the phrase, "if this is the intention of the parties". The Kentucky court in this decision apparently leaves no room for the intention of the parties to affect its decision. It is the contention of the writer that where the contract calls for payment when able (to pay or to do another thing), the intention of the parties that payment is to be made when and only when the condition is fulfilled must prevail.

A contract is a consensual agreement. Its terms are fixed by the acts of the parties to it, and the courts will try to give effect to the intention of the parties in so far as that intent can be determined. "The essential thing in construing a contract is to determine from it the intention of the parties and when the intention is determined, to enforce its provisions according to that intention."² The compromise agreement in the instant case called for payment when the church was financially able to complete the building. A contract must be given a reasonable construction.³ From a reasonable and natural interpretation of the words in the contract, it would seem that the church did not intend to pay until it was financially able to complete the building. And the plaintiff in the case accepted these terms. It would certainly be better to follow out the natural reading of the words when arriving at the intention of the parties than to introduce a condition which the parties apparently never intended. Of course, when no time is set for performance, a reasonable time is implied.⁴ All the cases which the court cites in support of the instant decision are wholly distinguishable. In no one of these was any time set for performance.⁵

In other cases the Kentucky court has held that no implication of payment within a reasonable time arises when payment is not called for until the happening of some event which the parties do not covenant to cause to happen. A promise to pay out of a particular fund not in existence is not enforceable until the fund is realized.⁶ There would seem to be but little difference between a promise to pay when able to pay and a promise to pay when able to do something else. This is recognized by Page and by the court in the instant case when they say by way of dictum that a promise to pay when able implies

² Gubbard v. Sheffield, 179 Ky. 442, 448, 200 S. W. 940, 943 (1918). To the same effect is Siler v. White Star Coal Co., 190 Ky. 7, 226 S. W. 102 (1918).

³ Caudill v. John P. Gorman Coal Co., 242 Ky. 294, 46 S. W. (2d) 93 (1932).

⁴ Thomas v. Coleman, 219 Ky. 524, 293 S. W. 1089 (1927).

⁵ Kaelin v. Kaelin, 209 Ky. 250, 272 S. W. 728 (1925), Thomson v. Coleman, *ibid.*, and Fyffe v. Skaggs, 246 Ky. 5, 54 S. W. (2d) 369 (1933).

⁶ Fox v. Buckingham, 228 Ky. 176, 14 S. W. (2d) 421 (1928).

payment within a reasonable time. Williston is opposed to the view of the Kentucky court.⁷ In this dictum, the court is directly in opposition to previous Kentucky cases, none of which were cited in the opinion. In *Martin v. Ferguson*,⁸ the court said that if a promise is to pay when able, then the ability of the promisor is the essence of the promise, and it should be averred and proved. It was further held in this state that a condition making an obligation to pay in money dependent upon the covenantor's ability to pay constituted a valid condition precedent.⁹ It would seem that the language of the extract from Page cited above would apply equally in these Kentucky cases as in the case under discussion, yet in the former cases the happening of the act was construed as a condition. Only one Kentucky case could be found contra to these cases as to the effect of a promise to pay when able, and that case was decided long before any of the others cited.¹⁰ Other states have held a promise to pay when able to be a valid condition precedent.¹¹ The conclusion which we must arrive at from a consideration of the above authorities is that the promise to pay when able to complete the building should have been construed as a valid condition precedent.

The court expressly refused to consider the matter of consideration in the compromise agreement. This is where the court seems to have erred. It is submitted that the court should have allowed the action on this basis. A promise to pay a doubtful claim is sufficient consideration for a promise to forbear.¹² But since the promise was to pay when the promisor deemed it advisable, it was illusory and in fact no promise.¹³ A promise which does not bind the promisor is not sufficient consideration for a return promise.¹⁴ Therefore the compromise agreement was void for lack of consideration, and recovery should have been allowed under the original contract.

JOHN L. DAVIS.

BAILMENTS—GROSS NEGLIGENCE AND THE LIABILITY OF A GRATUITOUS BAILEE

A, being confined in jail, requested B to take and keep for him a bag of gold money, to the end that it might not be lost. B did as requested, and placed the gold in a trunk, in which she kept her own money, and locked it. The gold was stolen along with a quantity of B's own money. The court ruled—citing several Kentucky cases—

⁷ 2 Williston: Treatise on Contracts (1920), Section 804.

⁸ 3 Ky. L. Rep. 445 (1881).

⁹ *Stanton's Admr. v. Brown*, 36 Ky. 248 (1838).

¹⁰ *Kancaid v. Higgins*, 1 Bibb 369 (Ky. 1809).

¹¹ *Van Buskirk v. Kuhns*, 164 Cal. 472, 129 Pac. 587 (1913); *Denney v. Wheelright*, 60 Miss. 733 (1883); *Work v. Beach*, 59 Hun. 625, 13 N. Y. Supp. 678 (1891); and *Salinas v. Wright*, 11 Tex. 572 (1854).

¹² Restatement Contracts, Sections 77, 79.

¹³ Restatement Contracts, Section 2, Comment b.

¹⁴ Williston, Contracts, Section 103e.